

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DAVID BURNETT, MICHAEL PARADISE, AND
DAVID NELSON as representatives of a class of
similarly situated persons, and on behalf of the
WESTERN GLOBAL AIRLINES, INC. EMPLOYEE
STOCK OWNERSHIP PLAN,

Plaintiffs,

v.

PRUDENT FIDUCIARY SERVICES LLC, MIGUEL
PAREDES, JAMES K. NEFF, CARMIT P. NEFF,
JAMES K. NEFF REVOCABLE TRUST DATED
11/15/12, CARMIT P. NEFF REVOCABLE TRUST
DATED 11/15/12, WGA TRUST DATED 8/16/13, and
JOHN DOES 1-10,

Defendants.

C.A. No. 1:22-cv-00270-RGA

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs submit as supplemental authority the attached decision of the United States District Court for the Southern District of New York in *Lloyd v. Argent Trust Co.*, No. 1:22-cv-04129-DLC, ECF No. 60 (December 6, 2022). Mirroring verbatim the arbitration provision at issue in this case, the arbitration clause in *Lloyd* was nonseverable and prohibited parties from obtaining in arbitration “any remedy which has the purpose or effect of providing additional benefits or monetary relief to any other Employee, Participant, or Beneficiary other than the Claimant.” *Compare id.* at 8, with D.I. 26-1 at 62. Like the arbitration clause in this case, it also stated that any equitable relief granted in the arbitration “is not binding on the Administrator or the Trustee with respect to any Employee, Participant or Beneficiary other than the Claimant.” *Compare Lloyd*, No. 1:22-cv-04129-DLC, ECF No. 60, at 9, with D.I. 26-1 at 62.

The court held that this provision prohibited “representative actions seeking relief on behalf of a plan even though ERISA expressly provides for such actions.” *Lloyd*, No. 1:22-cv-04129-DLC, ECF No. 60, at 9. The court concluded that the ability to bring a representative action on behalf of the plan is a “‘statutory right’ that an arbitration agreement cannot override.” *Id.* at 12-13 (citing *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 184 (2d Cir. 2021)). That is consistent with the Supreme Court’s observation that “[n]on-class representative actions . . . are part of the basic architecture of much of substantive law” and thus not waivable in an arbitration clause. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1922 (2022). Indeed, among the Court’s “[f]amiliar examples” of such claims were “trustee actions,” *id.*, which are directly analogous to claims under § 1132(a)(2). See *Adams v. Cyprus Amax Mins. Co.*, 149 F.3d 1156, 1160 (10th Cir. 1998) (“courts consistently have characterized ERISA actions . . . [as] akin to common law trust actions and thus governed by common law trust principles” (citing *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 649-50 (3d Cir. 1990))). This alone is dispositive.

The court further determined that the plan’s arbitration provision “imposes a limitation on relief that ERISA does not contain, and precludes remedies that ERISA expressly authorizes, such as the removal of a fiduciary.” *Lloyd*, No. 1:22-cv-04129-DLC, ECF No. 60, at 12-13 (citing 29 U.S.C. § 1109(a)). Contrary to Defendants’ new argument here that, in fact, fiduciary removal *is* available under the clause, the court in *Lloyd* easily concluded that the clause bars such relief. (And in any event, even if fiduciary removal were somehow available, the clause would still plainly bar equitable relief such as rescission, which would necessarily return money to participants beyond the plaintiffs in this case.)

Given that the arbitration clause in the instant case is materially identical to the clause at issue in *Lloyd*, this Court should reach the same conclusion here.

December 8, 2022

COOCH AND TAYLOR, P.A.

/s/ Carmella P. Keener

Carmella P. Keener (#2810)

1007 N. Orange St., Suite 1120

P.O. Box 1680

Wilmington, DE 19899-1680

(302) 984-3816

ckeener@coochtaylor.com

Attorney for Plaintiffs

OF COUNSEL:

STRIS & MAHER LLP

Peter K. Stris

Rachana A. Pathak

Victor O'Connell

John Stokes

777 S. Figueroa St., Suite 3850

Los Angeles, CA 90017

(213) 995-6800

pstris@stris.com

rpathak@stris.com

voconnell@stris.com

jstokes@stris.com

COHEN MILSTEIN SELLERS & TOLL PLLC

Michelle C. Yau

Daniel R. Sutter

Eleanor Frisch

1100 New York Ave. NW • Fifth Floor

Washington, DC 20005

(202) 408-4600

myau@cohenmilstein.com

dsutter@cohenmilstein.com

efrisch@cohenmilstein.com

NICHOLS KASTER, PLLP

Paul J. Lukas

Brock J. Specht

Caroline E. Bressman

4700 IDS Center, 80 S 8th Street

Minneapolis, MN 55402

(612) 256-3200

lukas@nka.com

bspecht@nka.com

cbressman@nka.com